Nos. 87-363 and 87-364

IN THE

Supreme Court of the United States

October Term, 1987

Federal Energy Regulatory Commission,

Petitioner,

v.

Martin Exploration Management Company, *et al.*,

Respondents.

Public Service Commission of The State of New York, *et al.*

Petitioners,

v.

Martin Exploration Management Company, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[Counsel for Producer Respondents are listed inside]

October 30, 1987

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

Amoco Production Company

William T. Benham*
200 East Randolph Drive
P. O. Box 5910-A
Chicago, Illinois 60680
(312) 876-7941

John L. Brunenkant
Grove, Jaskiewicz, Gilliam & Cobert
Suite 501
1730 M Street, N.W.
Washington, D.C. 20036
(202) 296-2900

Cities Service Oil & Gas Corp.

Michael L. Pate*
P. O. Box 300
Tulsa, Oklahoma 74102
(918) 561-4541

Exxon Corporation

C. Roger Hoffman
Douglas W. Rasch*
P. O. Box 2180
Houston, Texas 77001
(713) 656-1691

Independent Oil and Gas Association of West Virginia

R. Gordon Gooch*
Travis and Gooch
1101 15th St., N.W., Ste. 1200
P. O. Box 65688
Washington, D.C. 20035-5688
(202) 457-5500

Arco Oil and Gas Company

Harris S. Wood*
P. O. Box 2819
Dallas, Texas 75221
(214) 880-4869

BHP Petroleum Company Inc.

William S. Martin*
5051 Westheimer
1300 Post Oak Tower
Houston, Texas 77056
(713) 780-5313

Chevron U.S.A., Inc.

James B. Atkin*
David J. Evans
Pillsbury, Madison & Sutro
1667 K St., N.W., Suite 1100
Washington, D.C. 20006
(202) 887-0300

Grace Petroleum Corporation

Charles H. Shoneman*
Bracewell & Patterson
2000 K St., N.W., Ste. 500
Washington, D.C. 20006-1809
(202) 828-5800

Martin Exploration Management Company
Colorado Energy Corporation

Stephen A. Herman, P.C.*
James D. Senger
Kirland & Ellis
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5016

OHIO OIL AND GAS ASSOCIATION

M. HOWARD PETRICOFF*
W. JOHNATHAN AIREY
VORYS, SATER, SEYMOUR AND PEACE
52 East Gay St.
Columbus, Ohio 43215
(614) 464-5414

PHILLIPS PETROLEUM COMPANY

JOHN L. WILLIFORD
CHARLES L. PAIN*
JENNIFER A. CATES
1258 Adams Building
Bartlesville, Oklahoma 74004
(918) 661-6355

PLACID OIL COMPANY

RONALD D. HURST*
PAUL W. HICKS
3900 Thanksgiving Tower
Dallas, Texas 75201
(214) 880-1000

UNION OIL COMPANY OF CALIFORNIA

KENNETH L. RIEDMAN*
Room 907
P. O. Box 7600
Los Angeles, CA 90051
(213) 977-7768

PENNZOIL COMPANY

JOHN B. CHAPMAN*
KATHELENE E. MAGRUDER
PENNZOIL PLACE
700 Milam Street
Houston, Texas 77002
(713) 546-8859

JOHN MCDONALD
RICHARD E. POWERS, JR.
BUTLER & BINION
1747 Pennsylvania Ave., N.W.
Washington, D.C. 20005
(202) 466-6900

SHELL OFFSHORE, INC.
SHELL WESTERN E&P, INC.

THOMAS G. JOHNSON*
One Shell Plaza
Houston, Texas 77001
(713) 241-4742

UNION PACIFIC RESOURCES COMPANY

CONSTANCE D. COLEMAN*
801 Cherry Street
P. O. Box 7, MS 4010
Fort Worth, Texas 76101-0007
(817) 877-7540

* *Counsel of Record*

QUESTION PRESENTED

Whether a regulation adopted by the Federal Energy Regulatory Commission is valid under the Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301 *et seq.* ("NGPA"), where the regulation provides that natural gas qualifying for an incentive price regulated category under the NGPA is not subject to such incentive regulated prices and cannot be treated as falling in the regulated category if it also qualifies in any category eligible for price deregulation?

LIST OF PARTIES

The producer respondents ("Producers") joining in this Brief in Opposition are as follows:

Martin Exploration Management Company

Amoco Production Company

Arco Oil and Gas Company

BHP Petroleum Company Inc.

Chevron U.S.A., Inc.

Cities Service Oil and Gas Corp.

Exxon Corporation

Grace Petroleum Corporation

Independent Oil and Gas Association of West Virginia

Ohio Oil and Gas Association

Pennzoil Company

Phillips Petroleum Company

Placid Oil Company

Shell Offshore, Inc.

Shell Western E&P, Inc.

Union Oil Company of California

Union Pacific Resources Company

Pursuant to Rule 28.1, we include as an addendum hereto a listing naming all parent companies and non-wholly-owned subsidiaries and affiliates of the corporate respondents joining in this brief.

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OPINIONS BELOW

Petitioners seek review of the decision of the U.S. Court of Appeals for the Tenth Circuit in *Martin Exploration Management Co. v. FERC*, 813 F.2d 1059 (10th Cir. 1987) ("*Martin*"). The Court of Appeals affirmed in part and reversed in part Federal Energy Regulatory Commission ("Commission") Order No. 406 issued in FERC Docket Nos. RM84-14-000 et al., FERC Stats. & Regs. (Regs. Preambles 1982-85) (CCH) ¶ 30,614 (November 16, 1984) and Order No. 406-A on rehearing, FERC Stats. & Regs. (Regs. Preambles 1982-85) (CCH) ¶ 30,622 (December 21, 1984). Order No. 406-B, denying rehearing of Order No. 406-A, 30 FERC (CCH) ¶ 61,152 (February 15, 1985), is not pertinent to the issues raised in the petitions.

JURISDICTION

Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Section 101(b)(5) of the NGPA, 15 U.S.C. § 3311(b)(5), provides:

> (b) *Rules of General Application.*— . . . .
>
> . . . .
>
> (5) *Sales qualifying under more than one provision.*—If any natural gas qualifies under more than one provision of this subchapter providing for any maximum lawful price or for any exemption from such a price with respect to any first sale of such natural gas,

the provision which could result in the highest price shall be applicable.

Title 18 C.F.R. § 270.208 adopted in Commission Order No. 406 provides:

> First sales of natural gas that is deregulated natural gas as defined in § 272.103(a) is price deregulated and not subject to the maximum lawful prices of the NGPA, regardless of whether the gas also meets the criteria for some other category of gas subject to a maximum lawful price under Subtitle A of Title I of the NGPA.

This case also involves Sections 107(c)(5), 108 and 121 of the NGPA, 15 U.S.C. §§ 3317(c)(5), 3318 and 3331 (*see* Commission Pet. App. at 127a-131a).[1]

STATEMENT OF THE CASE

Partial Decontrol Under NGPA Section 121. The NGPA, 15 U.S.C. §§ 3301-3432, was enacted by Congress on November 9, 1978. The NGPA was carefully negotiated compromise legislation enacted only after long debate and discussion between representatives of producing and consuming states. The NGPA was intended to bring about a solution to what had become chronic shortages of natural gas in interstate commerce. Under the NGPA compromise, Congress provided a statutory means for setting of maximum lawful prices for gas in a number of different categories. *See generally Public Serv. Comm'n of New York v. Mid-Louisiana Gas Co.*, 463 U.S. 319, 325-

[1] App. refers to the Appendices to the Commission's Petition filed in No. 87-363 on August 31, 1987.

38 (1983) ("*Mid-Louisiana*"). Natural gas sold in intrastate commerce was brought under price controls for the first time as of the NGPA's effective date, December 1, 1978. Section 121 of the NGPA, 15 U.S.C. §3331, provided for price decontrol of certain categories of gas on differing dates. Section 121(a) of the NGPA removed price controls as of January 1, 1985, for the following categories of natural gas:

(1) New natural gas as defined in Section 102(c) of the NGPA.

(2) Natural gas produced from new onshore production wells as defined in Section 103(c) of the NGPA if that gas was not committed or dedicated to interstate commerce on April 20, 1977, and is produced from a completion location located at a depth of more than 5,000 feet.

(3) Natural gas sold under an existing contract, any successor to an existing contract or any rollover contract if (a) the gas was not committed or dedicated to interstate commerce on November 8, 1978, and (b) the price paid or payable on December 31, 1984, was higher than $1.00 per million Btu's.

15 U.S.C. § 3331(a). Other categories of gas remain subject to price controls indefinitely.

Notice of Proposed Rulemaking. Anticipating the January 1, 1985, partial decontrol of certain intrastate gas and gas produced from a large portion of the "new wells" commenced on or after February 19,

1977,[2] the Commission issued a Notice of Proposed Rulemaking in Docket No. RM84-14-000 on September 13, 1984, 49 Fed. Reg. 36,399, App. 34a-60a. The Commission proposed rules designed to implement NGPA Section 121(a) and to provide for price decontrol of the categories of gas scheduled to be decontrolled as of January 1, 1985. In the Notice the Commission first announced its tentative conclusion that where gas qualifies in an incentive price category and also qualifies for deregulation, where the regulated price may be higher than the deregulated price, the regulated prices would no longer apply. App. 43a-45a.

Order No. 406. On November 16, 1984, Order No. 406 was issued (App. 61a-103a). The Commission concluded that gas that qualifies in a still-regulated incentive price category must be decontrolled if such gas also qualifies in a decontrolled category (App. 73a-82a). The Commission denied producer claims of reliance upon the incentive prices in the higher still-regulated price categories despite numerous uncontradicted statements in comments and at the hearing of such reliance. (App. 79a-81a).

The primary categories which are still regulated and which might afford higher prices to producers than deregulated treatment are NGPA Sections 107(c)(5) and 108, 15 U.S.C. §§ 3317(c)(5) and 3318. Section 107(c)(5) allows the Commission to establish incentive prices for high cost gas produced under con-

[2] "New well" is defined in NGPA § 2(3), 15 U.S.C. § 3301(3), as a well whose surface drilling began on or after February 19, 1977, or which was deepened by at least 1,000 feet after that date.

ditions that the Commission determines present extraordinary risks or costs. The Commission has determined that gas produced from designated tight formations subject to a "negotiated contract price" may be priced at up to two hundred percent of the maximum lawful price specified for NGPA § 103(b)(1) gas.[3] Stripper well gas qualifying under Section 108 is gas produced from low volume wells which are frequently in the later stages of depletion, which would be abandoned prematurely leaving producible gas in the reservoir without the incentive price made available by Congress. The stripper well price is higher than the NGPA Section 102 new gas price and is designed to provide incentives for the fullest possible recovery of producible reserves. *See* 18 C.F.R. §§ 271.101, 271.703(a) and 271.801-271.807. The Commission decided that a new tight formation gas category determination also is necessarily a Section 102(c) or 103 determination, even if the producer never sought a determination that the gas in question qualified in Sections 102 or 103 (App. 81a-82a).[4]

Order No. 406-A. As to the issue raised in the current petitions, on rehearing the Commission reaffirmed the position stated in Order No. 406 (App.

[3] Interim Rule Covering High-Cost Natural Gas Produced From Tight Formations, 45 Fed. Reg. 13,414, FERC Stats. & Regs. (Regs. Preambles 1977-81) (CCH) ¶ 30,130 (February 28, 1980) ("Interim Rule"); Order No. 99, 45 Fed. Reg. 56,034, FERC Stats. & Regs. (Regs. Preambles 1977-81) (CCH) ¶ 30,183 (August 22, 1980).

[4] We do not discuss the second question raised in the Commission's petition. The Commission does not argue that standing alone it would warrant review. (Comm. Pet. at 13 n.19)

107a-116a). The new regulations were effective January 1, 1985.

Producers sought judicial review, and the Court of Appeals issued the *Martin* opinion now sought to be reviewed (App. 1a-31a).

SUMMARY OF ARGUMENT

This is a case of statutory construction. Section 101(b)(5), 15 U.S.C. §3311(b)(5), of the NGPA is the rule of construction to be applied when more than one provision of Title I applies. That section provides that:

> (b) *Rules of General Application.*— . . . .
>
> . . . .
>
> (5) *Sales Qualifying Under More than One Provision.*—If any gas qualifies under more than one provision of this title providing for any maximum lawful price or for any exemption from such a price with respect to any first sale of such natural gas, the provision which could result in the highest price shall be applicable.

Thus, the language of the NGPA is clear and unambiguous. If the gas is exempted under Section 121 of Subtitle B from the application of a maximum lawful price (i.e., deregulates) and remains qualified for a regulated maximum lawful price under another provision of Title I, the statute permits collection of the highest price for which the gas is eligible.

The Commission and its supporters seek to have the Court disregard the plain language of Section

101(b)(5). Where Congress has spoken on an issue, its pronouncement is mandatory as the controlling law. Statutes are to be construed in a manner most consistent with common understanding. Instead, petitioners engage in sophistry in order to arrive at a preconceived result plainly inconsistent with Congressional intent. The Commission's construction is at odds with the language, legislative history and Congress' intent in adopting the NGPA.

This case presents a narrow statutory construction issue of limited and ever-declining applicability. Dual category gas constitutes an unquantified but very small percentage of the nation's natural gas supplies. Dual category gas covered by commitments to purchase at ceiling prices is a much smaller volume. None of the traditional grounds for granting certiorari are present here. The Court's attention is simply not warranted.

The decision of the U.S. Court of Appeals for the Tenth Circuit thoroughly and correctly analyzed the issues and invalidated Section 270.208 of the Commission's regulations as inconsistent with Section 101(b)(5) of the NGPA. The writs sought in these cases should be denied.

REASONS FOR DENYING THE WRIT

Introduction. In this case the Commission has sought to manufacture ambiguity where none exists in a very specific controlling statutory command. Generally, we refer the Court to the Tenth Circuit's *Martin* opinion for its cogent treatment of the arguments advanced by the Commission. A review of the *Martin* opinion leads to the conclusion that Section 270.208 of the Commission's regulations cannot stand. Con-

gress spoke directly on the issue of regulatory treatment under the NGPA for gas falling into multiple price categories, specifically including the situation that prevails when one of the multiple price categories is eligible for price decontrol. Section 101(b)(5) states that the price category that will result in the highest price applies. This result is consistent with Congress' expressly stated intent, the legislative history of the NGPA and Congress' overall objective of providing continuing incentives for production of high cost Section 107(c)(5) gas and Section 108 gas in the later stages of depletion even during and after a transition to a field market controlled more by market forces than by regulation. In contrast, the Commission's result can withstand neither plain meaning analysis nor a review for reasonableness.

Statutory language. Turning first to the statutory language, Section 101(b)(5) seems clear on its face that if gas qualifies under multiple price categories whether regulated or deregulated, "the provision which could result in the highest price shall be applicable." But rather than look at Section 101(b)(5), the other general rules of application in Section 101(b) and Section 121 of the NGPA as a consistent whole, the Commission either ignores or seeks to alter this controlling subsection in an effort to obtain the result that regulated incentive prices may no longer be collected under applicable maximum lawful price or similar clauses.

"Exemption" Refers to Decontrolled Categories. The first issue involves the meaning of "exemption from such a price." As used, this is a very clear reference to deregulated categories, since it immediately follows "any maximum lawful price" and is parallel with a

similar "exemption" reference in Section 101(b)(9) of the NGPA (App. 13a-15a).[5] Thus the language of NGPA Section 101(b)(5) is clear and prohibits adoption of any rule mandating involuntary deregulation for incentive price regulated gas. The rule was accurately described in the primary source of legislative history for the NGPA, the Conference Report:

> The conference agreement provides that if natural gas qualifies under more than one price category, the provisions that permit the seller *to obtain* the highest price applies.[6]

Moreover, in one of its own prior proceedings the Commission itself found that "[u]nder Section 101(b)(5), gas qualifying under one or more categories receives the highest maximum lawful price for which it is eligible including a deregulated price, if applicable."[7]

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[5] Petitioners in both cases appear to have abandoned any contention that "exemption" does not refer to deregulated categories.

[6] H.R. Rep. No. 1752, 95th Cong., 2d Sess. 74, *reprinted in* 1978 U.S. Code Cong. & Admin. News 8983, 8991 (emphasis added) ("Conference Report").

[7] Interim Rule , 45 Fed. Reg. at 13,422-23.

New York, et al. also suggest (Pet. at 11) that the Commission construction is entitled to deference on the ground that it is a contemporaneous construction of the statute. The statement is incorrect. The current Commission interpretation wasn't even invented until 1984 and was first disclosed in the notice of proposed rulemaking in this case. See letter from Commission Chairman Curtis to Senator Jackson forwarding the Commission's Section by Section Analysis and the Analysis, mimeo at 22, (Sept. 8, 1978) for a differing contemporaneous interpretation, *reprinted in* Natural Gas Policy Act Information Service

"Could" Refers to Real World Prices. Initially, the Commission focuses on "could" in the phrase in Section 101(b)(5) "the provision which *could* result in the highest price shall be applicable." This argument seeks to transform the meaning of "could" from "was, should be or would be able"[8] to the realm of theoretical possibilities. Since a deregulated price could in theory be infinitely high, that option must always control, says the Commission. The Court of Appeals dealt effectively with the position, finding that reference to the real world is necessary (App. 15a-16a). The Court of Appeals correctly found that the "could" theory of the Commission would render meaningless a statutory provision that deals with two possibilities by forever negating one of those possibilities. The result is plainly inconsistent with this Court's own prior comments in *Mid-Louisiana* concerning Section 101(b)(5):

> The statute evinces careful thought about the extent to which producers of "old gas"—gas already dedicated to interstate commerce before passage of the NGPA—would be able to enjoy incentive pricing . . . . However, § 101(b)(5) of the Act specifies that if a volume of gas fits into more than one category, "the provision which could result in the highest price shall be applicable." Thus, old gas that would be subject to the old NGA vintaging rules may be entitled to a higher rate if it falls within one or more of the

(FPAS) ¶ 101:220, at 2. *Compare* Statement of Senator Jackson, *id.* ¶ 101:230, at 1, 124 Cong. Rec. S15020-21 (daily ed. Sept. 12, 1978).

[8] Webster's New International Dictionary, unabridged (2d ed. 1954).

> other Title I categories, in particular §107 (high-cost natural gas) and §108 (stripper well gas). Whether or not the old NGA rates were in fact sufficient to stimulate some production from those categories, Congress concluded that the nation's energy needs justified the higher, statutory rates.[9]

The Court of Appeals also cited a number of other decisions reading Section 101(b)(5) in a common sense manner contrary to the Commission's analysis of "could".[10] The use of that term in Section 101(b)(5) designates as the applicable price category the category that actually results in the highest prices payable to the producer or first seller.

Congress would not have seized upon a subtlety so obscure as the Commission's current interpretation of "could" had it intended that deregulated treatment must always apply to dual category gas eligible for decontrol. The NGPA was "the product of a conference committee's careful reconciliation" of "two strong, but divergent, responses to the natural gas shortage" *Mid-Louisiana*, 463 U.S. at 331, a compromise that "took into account the conflicting interests of producers and consumers." *Pennzoil Co. v. FERC*, 645 F.2d 360, 379 (5th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982) ("Pennzoil"). The NGPA was "Congress' solution to the necessity of encouraging production and exploration of new natural gas sources and maintaining adequate supplies of natural gas in the interstate market." *Oklahoma v. FERC*, 661 F.2d 832, 834 (10th Cir. 1981), *cert. denied*, 457 U.S. 1105 (1982). The closely negotiated NGPA compromise

[9] 463 U.S. at 334-35 (note omitted).

[10] App. 12a-13a n.8.

came about only after 18 months of legislative battles. It contains many provisions favorable to the interests of consuming states, which are balanced by other provisions favoring producing producing states.

Large areas of detail were withdrawn from the Commission's discretion in favor of closely negotiated specific rules expressed in as clear language as could be written. It is not surprising, therefore, that Congress foresaw the very issue now under review. Congress never would have drafted Section 101(b)(5) as it did to provide that the higher of two potentially applicable provisions will apply if only one of the two provisions could possibly apply. One simply does not draft a statute providing for "the higher of A or B" if B is always higher. If that were the intent, Congress simply would have stated that the Section 101(b)(5) rule would apply only as between multiple regulated categories and prior to deregulation. Very specific terms mandating only decontrolled treatment for gas eligible for decontrol would have been used. No such qualifications were adopted in Section 101(b)(5), Section 121 or elsewhere.

The Commission next argues that the Court of Appeals' reading of Section 101(b)(5) would entangle the Commission in contract construction, an anomaly in a statute otherwise concerned only with ceiling prices (Comm. Pet. at 15-6). This is a straw-man argument. The *Martin* court does not construe the statute to require constant reference to contract provisions. Indeed, the Commission lacks jurisdiction over many such contract disputes, *Pennzoil*, 645 F.2d at 380-82. Section 101(b)(5) quite simply gives the producer the benefit of the highest of all potentially

applicable maximum lawful price and decontrolled categories. There is no "glaring anomaly".

Section 121 Does Not Nullify Section 101(b)(5). The Commission and supporting parties argue that "deregulation is mandatory" and that the Court of Appeals' result is inconsistent with an overall single objective of the NGPA to move toward a deregulated field market (Comm. Pet. at 16-8, New York Pet. at 7). There are a number of answers to these contentions (App. 11a, 13a n.9). First, general arguments about overall objectives cannot override contrary statutory language.[11] Second, the Commission's argument recognizes, as it must, that the NGPA was compromise legislation embodying a mix of conflicting objectives. While a less regulated field market was an important eventual objective, so was the immediate equalization of access to field markets by both interstate and intrastate purchasers. Supply elicitation was another primary and continuing objective of the NGPA. Continued incentive pricing for Section 107(c)(5) high-cost gas and Section 108 stripper gas was plainly another of Congress' supply eliciting objectives.

Third, the argument that "deregulation is mandatory" simply begs the question. There is no dispute that gas eligible for decontrol is in fact eligible for decontrol. Yet gas which is eligible for continued incentive prices is with equal force still eligible for those

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[11] Federal Reserve System v. Dimension Financial Corp., 474 U.S. 361 (1986) ("Federal Reserve System"). Nor can general rulemaking authority do so. The Commission argues the contrary (Comm. Pet. at 18 n.21). NGPA rules must be consistent with the statute. NGPA Sections 501(a) and (b), 15 U.S.C. §§ 3411(a) and (b); 5 U.S.C. § 706(2)(C).

price incentives under the NGPA if that treatment results in a higher price. Section 121 speaks only of decontrol of named *categories* of gas.[12] The Commission's interpretation is unreasonable in any event in light of the Conference Report at 92: "The conference agreement does not provide for deregulation of any natural gas production not specifically enumerated in this section."[13]

Fourth, the argument that the Court of Appeals' result could cause frequent switches from regulated to deregulated category treatment is both factually erroneous and beside the point. Producers committed large investments to drill, fracture and equip wells producing high cost tight formation gas and to maintain or enhance production from stripper wells in reliance on continued availability of the NGPA price incentives in these categories. Producers have been unable to negotiate new contracts in the market at the NGPA incentive category price ceilings since early to mid-1983. The relatively few producers able to benefit from regulated treatment through older contracts with ceiling price clauses covering still-regulated incentive category gas will not be making frequent switches between deregulated and regulated treatment in the current and foreseeable energy markets. Contrary to the Commission's suggestion, this is not an ever-growing problem. Gas is being depleted as it is produced each day. Contracts are being renegotiated daily. Estimates of the cost of the Court of Appeals' decision are substantially overstated by petitioners.

[12] Mid-Louisiana, 463 U.S. at 336 n.14.

[13] 1978 U.S. Code Cong. and Admin. News at 9009.

New York, et al. persist in the argument that Section 101(b)(5) of the NGPA is not applicable, arguing that Section 121 makes *all* of subtitle A of Title I of the NGPA inapplicable to deregulated gas (New York Pet. at 8-9). The Commission itself expressly "does not renew" this argument (Comm. Pet. at 13 n. 19). The Court of Appeals properly rejected it (App. 10a-16a). This construction would render not only Section 101(b)(5) but other "rules of general application" meaningless. It would negate applicability of Section 101(b)(5) to deregulated gas even though Section 101(b)(5) expressly refers to deregulated gas. Section 101(b)(5) definitely applies to dual category gas at least in its capacity as regulated gas. Finally, not even the language of Section 121 supports the argument. Only the provisions of subtitle A "*respecting the maximum lawful price* for the first sale of each of the following categories" are made inapplicable, not all of subtitle A. In Section 121, Congress intended to eliminate only price controls for the named categories; it did not intend or state that other rules of general application are repealed.[14]

Category Selection. The Commission argues that the statute denies the producer any choice about applicable price categories and dictates that the *only* ap-

[14] The Commission (Comm. Pet. at 13 n.19) and New York (Comm Pet. at 6 n.3) repeat a claim from Order No. 406 that Producers have changed their tune regarding Section (101)(b)(5). The Pennzoil Co. comments quoted at App. 74a n.10 assert only that deregulated treatment for a Section 102 well which also qualifies as a tight formation well is an available option which cannot be denied by the Commission (R. 3179-84). The issue was resolved in a similar manner in the Tight Formations Gas Interim Rule, FERC Stats. & Regs. (Regs. Preambles 1977-81) (CCH) ¶ 30,130 at 30,917 (1980).

plicable category is the category which "could result in the highest price." (Comm. Pet. at 18-21). This argument is but a variant of the "could" sophistry. The Commission now concedes that it is referring only to situations where natural gas has actually been qualified in both a still-regulated incentive price category and in a category eligible for decontrol, and repeats in different words its argument that in theory, deregulated prices must always control because they "could" be higher. The statute plainly and simply assures producers that when multiple categories could apply, the one that will result in the highest price does apply. Contrary to the Commission's straw-man argument (Comm. Pet. at 19-20), this construction imposes absolutely no burden on the agency to require the filing of reports and contracts in order to identify applicable categories. The Commission's historic policy of enforcement of NGPA prices by audits and actions on complaints is fully adequate. Compliance assessments will simply be based on the most favorable category from time to time. Producers are best equipped to determine in practice which category results in the highest price and is therefore applicable.[15]

[15] The Commission's attempt to distinguish the statement at page 83 of the Conference Report that stripper gas could be sold "subject to the provisions of Section 108 rather than taking deregulated treatment" (Comm. Pet. at 21 n.24) is not distinguishable on the basis cited by the Commission. Section 121(e) of the NGPA refers not to an overlap of two regulated categories, but to the relationship between Section 108 pricing and the operation of NGPA Section 105(b)(3), 15 U.S.C. § 3315(b)(3). The latter is *not* a separate regulated price category, but a post-decontrol limitation on the operation of indefinite price escalator clauses in certain intrastate contracts for the sale of deregulated gas. Congress intended that Section 108 prices may be collected notwithstanding that limitation, as the Commission acknowledged in Order No. 406-B, 30 FERC (CCH) ¶ 61,152 at 61,323, R. 3388-9 (February 15, 1985).

Finally, as the court found, the legislative history clearly supports producer choice in the matter of price categories (App. 19a).

The Commission suggests that since most assumed energy prices would exceed inflation rather than vice versa, Congress gave no consideration to the result that has ensued—the highest price is an incentive regulated price (Comm. Pet. at 20-21). This argument attempts to override clear statutory language with legislative history. The attempt fails; the fact that most assumed deregulated prices would be higher illuminates the legislative history and confirms the Court of Appeals' result. The legislators were simply saying that Section 101(b)(5) allows producers to obtain the highest price under any applicable category.[16]

Impact. Finally, the Commission and its supporters argue that the *Martin* opinion may increase consumer's natural gas costs in the 1985-1987 period by approximately $300 million, or about $100 million per year. It is alleged that pipelines and their customers cannot bear such costs. To the contrary, the financial impact of the *Martin* opinion is minimal. Where financial impacts occur, they result solely from Congressionally intended incentive prices and pipelines' own voluntary promises to pay those prices.

[16] "It is up to the producer to apply for whatever designation he determines is most likely to be of greatest benefit to him." 124 Cong. Rec. H13,116 (daily ed. Oct. 14, 1978) (statement of Rep. Dingell); "[T]his provision stands for the proposition that a producer may claim or apply for the highest price to which he is entitled." 124 Cong. Rec. S15,021 (daily ed. Sept. 13, 1978) (statement of Sen. Jackson).

The $100 million per year estimate was not made on the record by the Commission. Instead it is drawn from an extra-record letter from counsel for the Interstate Natural Gas Association of America to the Commission which urged the Commission to seek certiorari in this case. The estimate is the supposed result of a hasty study by highly interested parties who used unknown but clearly favorable assumptions and premises in performing the "study". Counsel for INGAA was requested to provide a copy of the "study" to Producer counsel, but did not do so. No credence should be given to such extra-record estimates. Even if we assume that producer revenues may increase by upwards of $100 million per year as a result of vacation of the Commission's rule, that amount is on the order of 0.16% of consumers' total annual gas expenditures.[17]

CONCLUSION

The Commission's effort in this case to deny producers the right to incentive price regulated category treatment is reminiscent of its effort to deny NGPA

[17] Energy Information Administration *Natural Gas Monthly*, Tables 3 and 4 (April 1987). 1986 total consumption of 14.581 Tcf times an overall average price per Mcf of $4.26 equals $62.115 billion. $100 million is about 0.16% of this annual cost.

In fact, the Commission's effort to deny producers regulated incentive prices is counterproductive. Many producers of tight formation gas desire to sell those gas supplies at prices below the regulated incentive prices in order to gain a tax credit under Internal Revenue Code § 29. *See* 26 U.S.C. §§ 29(a), (c) and (e). The tax credit is applicable only to *regulated* tight formation gas. 26 U.S.C. §29(c)(2)(B). But the Internal Revenue Service has denied tax credit treatment for this gas based on Order No. 406. Rev. Rul 86-127, 1986-2 C.B.4 (1986).

pricing treatment to pipeline production in *Mid-Louisiana*. In that case, the Court reviewed the structure of Title I of the NGPA in detail and concluded that the Commission's interpretation of the "first sale" definition of the statute was inconsistent with its plain terms. Here, the issue is considerably less difficult; the statute's meaning is clear. Where Congress has spoken on a particular matter, its will is the law and must be given effect. An agency may not "correct flaws that it perceives in the statute . . . . Its rule-making power is limited to adopting regulations to carry into effect the will of Congress as expressed in the statute." *Federal Reserve System*, 474 U.S. 361, 106 S. Ct. 681 at 689. The Court's inquiry must therefore "come to rest with the conclusion that the action of [the agency] is inconsistent with the language of the statute." *Id.*

The narrow statutory construction issue involved is of limited applicability which decreases every day as gas depletion of wells subject to older contracts continues. No conflict among the circuits exists or is likely.

The writs should be denied.

Respectfully submitted,

John L. Williford
Charles L. Pain*
Jennifer A. Cates
Attorneys for
Phillips Petroleum Company

Charles L. Pain
1258 Adams Building
Bartlesville, OK 74004
(918) 661-6355

AND ON BEHALF OF:

Amoco Production Company

William T. Benham*
200 East Randolph Drive
P. O. Box 5910-A
Chicago, Illinois 60680
(312) 876-7941

John L. Brunenkant
Grove, Jaskiewicz, Gilliam & Cobert
Suite 501
1730 M Street, N.W.
Washington, D.C. 20036
(202) 296-2900

Cities Service Oil & Gas Corp.

Michael L. Pate*
P. O. Box 300
Tulsa, Oklahoma 74102
(918) 561-4541

Arco Oil and Gas Company

Harris S. Wood*
P. O. Box 2819
Dallas, Texas 75221
(214) 880-4869

BHP Petroleum Company Inc.

William S. Martin*
5051 Westheimer
1300 Post Oak Tower
Houston, Texas 77056
(713) 780-5313

Chevron U.S.A., Inc.

James B. Atkin*
David J. Evans
Pillsbury, Madison & Sutro
1667 K St., N.W., Suite 1100
Washington, D.C. 20006
(202) 887-0300

Exxon Corporation

C. Roger Hoffman
Douglas W. Rasch*
P. O. Box 2180
Houston, Texas 77001
(713) 656-1691

Independent Oil and Gas Association of West Virginia

R. Gordon Gooch*
Travis and Gooch
1101 15th St., N.W., Ste. 1200
P. O. Box 65688
Washington, D.C. 20035-5688
(202) 457-5500

Ohio Oil and Gas Association

M. Howard Petricoff*
W. Johnathan Airey
Vorys, Sater, Seymour and Peace
52 East Gay St.
Columbus, Ohio 43215
(614) 464-5414

John McDonald
Richard E. Powers, Jr.
Butler & Binion
1747 Pennsylvania Ave., N.W.
Washington, D.C. 20005
(202) 466-6900

Grace Petroleum Corporation

Charles H. Shoneman*
Bracewell & Patterson
2000 K St., N.W., Ste. 500
Washington, D.C. 20006-1809
(202) 828-5800

Martin Exploration Management Company
Colorado Energy Corporation

Stephen A. Herman, P.C.*
James D. Senger
Kirland & Ellis
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5016

Pennzoil Company

John B. Chapman*
Kathelene E. Magruder
Pennzoil Place
700 Milam Street
Houston, Texas 77002
(713) 546-8859

PLACID OIL COMPANY

RONALD D. HURST*
PAUL W. HICKS
3900 Thanksgiving Tower
Dallas, Texas 75201
(214) 880-1000

UNION OIL COMPANY OF
CALIFORNIA

KENNETH L. RIEDMAN*
Room 907
P. O. Box 7600
Los Angeles, CA 90051
(213) 977-7768

SHELL OFFSHORE, INC.
SHELL WESTERN E&P, INC.

THOMAS G. JOHNSON*
One Shell Plaza
Houston, Texas 77001
(713) 241-4742

UNION PACIFIC RESOURCES
COMPANY

CONSTANCE D. COLEMAN*
801 Cherry Street
P. O. Box 7, MS 4010
Fort Worth, Texas 76101-0007
(817) 877-7540

**Counsel of Record*

ADDENDUM

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This addendum lists the parent companies, non-wholly-owned subsidiaries and affiliates of the corporate respondents joining in this brief and is filed pursuant to Rule 28.1 of the rules of this Court.

AMOCO PRODUCTION COMPANY

Amoco Production Company is a wholly-owned subsidiary of Amoco Corporation. To the best knowledge of counsel, affiliates of Amoco Production Company that may have securities in the hands of the public in the United States or Canada are:

Amoco Australia Limited
Amoco Canada Petroleum Company, Ltd.
Amoco Company
Amoco Credit Corporation
Amoco Oil Holdings, S.A.
Amoco (U.K.) Exploration Company
Analog Devices, Inc.
Cetus Corporation
Cyprus Mines Corporation.

ARCO OIL AND GAS COMPANY

Arco Oil and Gas Company is an affiliate of Atlantic Richfield Company. The non-wholly-owned subsidiaries of Atlantic Richfield Company are:

Alyeska Pipeline Service Company
Anamax Mining Company
ARCO Chemical Company
ARCO Solar (Europe) GmbH
ARCO Solar Nigeria Ltd.
Arcobrasil Participacoes e Investimentos

Ltda.
Badger Pipeline Company
Black Lake Pipe Line Company
Blair Athol Coal Pty. Limited
Compania Minera Dos Republicos S.A. de C.V.
Compania Petrolera Carco
Colonial Pipeline Company
Cook Inlet Pipe Line Company
Curragh Coal Sales Co. Pty. Ltd.
Dixie Pipeline Company
East Texas Salt Water Disposal Company
85819 Canada Limited
Eisenhower Mining Company
FX Liquidation Corporation
Industrias Nacobre S.A. de C.V.
Iricon Agency Ltd.
Kenai Pipe Line Company
Kuparuk Transportation Company
Las Quintas Serenas Water Company
Logan Aluminum, Inc.
Nordisk Mineselskab A/S
Platte Pipe Line Company
Prince Consolidated Mining Company
Rodman, Inc.
Showa Arco Solar Far East Pte Ltd.
Showa Arco Solar KK
Sinclair Venezualan Oil Company
Smoke House Copper Mining Company
Tecumseh Pipe Line Company
Texas-New Mexico Pipe Line Company

BHP PETROLEUM COMPANY INC.

BHP Petroleum Company Inc. is owned by BHP Petroleum (Americas) Inc., which is owned by BHP

Holdings USA Inc., which is owned by BHP Petroleum Proprietary, Ltd., which is owned by Broken Hill Proprietary Company, an Australian corporation. BHP Petroleum Proprietary, Ltd. owns a partial interest in Hamilton Oil Corporation.

CHEVRON U.S.A., INC.

Chevron U.S.A., Inc. is a wholly-owned subsidiary of Chevron Corporation. The non-wholly-owned subsidiaries and affiliates of Chevron Corporation are:

AMAX Inc.
Arabian American Oil Company
Atlas Supply Company
C-W Properties Inc.
Caltex Mediterranean Limited
Caltex Petroleum Corporation
Canyon Reef Carriers, Inc.
Chevron Capital N.V.
Chevron Capital U.S.A. Inc.
Chevron Investment Management Company
Chevron Oil Finance Company
Dixie Pipeline Company
Explorer Pipeline Company
Felix Oil Company
Glenwood Properties
Gulf Oil Finance Company
Kenai Pipe Line Company
Long Beach Oil Development Company
Mid-Valley Pipeline Company
Paloma Pipe Line Company
Pembroke Capital Company Inc.
Plantation Pipe Line Company
Platte Pipe Line Company
Refineria Petrolera de Guatemala-California, Inc.

Standard Pacific Gas Line Incorporated
UNC Incorporated
West Texas Gulf Pipe Line Company

CITIES SERVICE OIL AND GAS CORPORATION

Cities Service Oil and Gas Corporation is a wholly-owned subsidiary of Cities Service Company, which is in turn, a wholly-owned subsidiary of Occidental Petroleum Corporation. Its non-wholly-owned affiliates are:

Canadian Occidental of California, Inc.
IBP, Inc.

EXXON CORPORATION

The non-wholly-owned subsidiaries and affiliates of Exxon Corporation that may have securities in the hands of the public in the United States or Canada are:

Exxon Pipeline Company
Imperial Oil Limited

GRACE PETROLEUM CORPORATION

The parent company of Grace Petroleum Corporation is W. R. Grace & Company. The non-wholly-owned subsidiaries, partnerships and joint ventures of W. R. Grace & Company are:

United States

Agracetus
AmmTrans
Axial Basin Ranch Company
AWI

Bartow Chemical Products
Bison Nitrogen Products
Carbon Dioxide Slurry Systems L.P.
CFF Beverage Company
Colowyo Coal Company
Del Taco Corporation
Four Corners Mine
Ft. Meade Chemical Products
GHL Management, Inc.
Grace Drilling Company
Grace-Feldmuehle Motor Ceramics Company
Grace Ventures Partnership One
Hayden Gulch West Coal Company
H-G Coal Company
Home Quarters Warehouse, Inc.
Marine Culture Enterprises
Monolith Enterprises, Incorporated
Mountainview Insurance Company
National Medical Care, Inc.
Oklahoma Nitrogen Co.
Paramont Coal Company
Pursue Gas Processing and Petrochemical Company
Sierra Chemicals Company
Taco Villa, Inc.
T & D Beverage, Inc.
TAG Pharmaceuticals, Inc.

Canada

First New York Corp.

Colombia

Productora de Papeles S.A.

Germany

Feldmuehle—Grace Noxeram G.m.b.H.

Japan

Fuji-Davison Chemical Ltd.
Kabushiki Kaisha Furukawa Seisakusho
Nippon Belt Kogyo Kabushiki Kaisha
Teroson Kabushiki Kaisha

Trinidad and Tobago

Homco Trinidad Ltd.
Trinidad Nitrogen Co., Limited

United Kingdom

Dunbee-Elm Ltd.
Sea Oil Homco Limited

MARTIN EXPLORATION MANAGEMENT COMPANY COLORADO ENERGY CORPORATION

The non-wholly-owned subsidiaries and affiliates of Martin Exploration Management Company are:

Martin Oil Marketing, Ltd.
Martin Oil of Indiana, Inc.
Pioneer Steel and Tube Disributors, Inc.
Russell Well Servicing, Inc.
Financial Associates, Inc.

Colorado Energy Corporation has no non-wholly-owned subsidiaries or affiliates other than those listed above.

PENNZOIL COMPANY

The non-wholly-owned subsidiaries and affiliates of Pennzoil Company are:

National Transit Company
10 Minute Service Centres Limited
The Eureka Pipe Line Company
American Sulphur Export Corporation
Pennzoil (U.K.) Limited
P. T. Sungai Kencana
P. T. Indo Muro Kencana
Proven Properties Inc.

PHILLIPS PETROLEUM COMPANY

The non-wholly-owned subsidiaries and affiliates of Phillips Petroleum Company are:

Alyeska Pipeline Service Company
Arctic LNG Transportation Company
Bissendorf Biosciences GmbH
Canada Western Cordage Company, Limited
Canyon Reef Carriers, Inc.
Chisholm Pipeline Company
Cochin Refineries Limited
Colonial Pipeline Company
Dixie Pipeline Company
East Texas Salt Water Disposal Company
Explorer Pipeline Company
Great Yarmouth Port Labour Company Limited
Heat Transfer Research, Inc.
Insurance & Reinsurance Brokers (Bermuda) Limited
Iranian Marine International Oil Company-Iminoco

Kenai LNG Corporation
Long Beach Oil Development Company
Multinational Gas and Petrochemical Com pany
Multinational Gas and Petrochemical Services Limited
Norland GmbH Fur Grundbesitz Und Indus trieanlagen
Norpipe A.S.
Norpipe Petroleum UK Limited
Norsea Gas A/S
Norsea Gas GmbH
Norsea Pipeline Limited
Oil Insurance Limited (New)
Papago Chemicals, Inc.
Phillips Carbon Black Limited
Phillips Petroleos Chile S.A.
Phillips Petroleum Singapore Chemicals (Private) Limited
Phillips Petroleum Toray Inc.
Phillips-Imperial Petroleum Limited
Polar LNG Shipping Corporation
Proteina Brasileira Ltda.
Renoilt - Haus GmbH
Solar Gas, Inc.
Spodco Limited
Spodco-USA, Inc.
The Salk Institute Biotechnology/Industrial Associates Inc.
Venezoil, C.A.
Western Desert Operating Petroleum Company (WEPCO)
White River Shale Oil Corporation

PLACID OIL COMPANY

Placid Oil Company is a privately owned corporation. It has no subsidiaries or affiliates which are not wholly owned.

SHELL OFFSHORE, INC.
SHELL WESTERN E & P, INC.

Shell Oil Company wholly owns all of the stock of Shell Energy Resources, INc., which Company wholly owns all of the stock of Pecten International Company, Scallop Coal Corporation, Shell Offshore INc., Shell Minng Company and Shell WEstern E&P Inc. Al of Shell Oil Company's common stock is owned by SPNV Holdings, Inc., a Delaware corporation, whose stock is owned by Shell Petroleum N.V., a Netherlands company. The voting shares of Shell Petroleum N.V. are held sixty percent (60%) by Royal Dutch Petroleum Company and forty percent (40%) by Shell Transport and Trading Company, a Public Limited Company in London, U. K. Shell Oil Company also wholly owns directly or indirectly a number of companies. The following companies are affiliates of the companies named above, but are not wholly-owned subsidiaries:

Fractionation Research, Inc.
Gravcap, Inc.
Heat Transfer Research, Inc.
Inland Corporation
Loop, Inc.
MESBIC Financial Corporation f Houston
Oil Companies Institute for Marine Pollution Compensation Limited
Oil Insurance Limited
Seadock, Inc.

Pecten Cameroon Company
Thums Long Beach Company
East Texas Salt Water Disposal Company
Grande Ecallie Land Company, Inc.
Van Salt Water Disposal Company
Wyoming Industrial Development Corporation
Lucky Chance Mining Company, INc.
George Neuman and Company
United Scientific, Inc.

UNION OIL COMPANY OF CALIFORNIA

The non-wholly-owned affiliate of Union Oil Company of California is Union Exploration Partners, Ltd.

UNION PACIFIC RESOURCES COMPANY

The parent of Union Pacific Resources Company is Union Pacific Corporation. The non-wholly-owned subsidiaries and affiliates of Union Pacific Corporation are:

Bear Creek Uranium Company
Black Butte Coal Company
Camas Prairie Railroad Company
Carbon County Coal Company
Corpus Christi Petrochemical Company
The Denver Union Terminal Railway Company
Esperanza Pipeline Company
Ferguson-Burleson County Gas Gathering System
Frontier Pipeline
Jefferson Southwestern Railroad Company
Kansas City Terminal Railway Company

Longview Switcghing Company
M-C Carbon Partnership
Medicine Bow Coal Company
The Ogden Union Railway and Depot Company
Portland Traction Company
Portland Terminal Railroad Company
The St. Joseph and Grand Island Railway Company
St. Joseph Terminal Railroad Company
Southern Illinois and Missouri Bridge Company
Stansbury Coal Company
Stauffer Chemical Company of Wyoming
Trailer Train Company
Uinta Development Company
Union Pacific Corporation
Union Pacific Resources Ltd.
Upland Industries Corporation
The Weatherford Mineral Wells and Northwestern Railroad Company
Arkansas & Memphis Railway Bridge and Terminal Company
Automated Monitoring and Control International, Inc.
Central California Traction Company
Chicago and Western Indiana Railroad Company
Great Southwest Railroad, Inc.
Oakland Terminal Railway
Railroad Association Insurance Limited
Terminal Railroad Association of St. Louis
Texas City Terminal Railway Company
The Belt Railway Company of Chicago

The Pueblo Union Depot and Railroad
Company
Union Pacific Realty Company